Supreme Court, U. S.
FILED
FEB 6 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-624

ERNST RUSS STEAMSHIP COMPANY,

Petitioner,

vs.

JOHN MATTHEWS,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PRELIMINARY STATEMENT

Respondent herewith submits that the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be denied for reason that the petitioner is endeavoring to contort what really are questions of fact into questions of law with respect to the condition of the ladder which injured plaintiff, and the circumstances surrounding its use.

Respondent believes that the jury in the district court was fairly and reasonably charged with the applicable law extant to a longshoreman third party liability under the Longshoremen's and Harbor Workers' Compensation Act, and that liability could be found against the vessel owner under any well-recognized theory of recovery, be it "reasonable care under the circumstances" or the principles found in the Restatement of the Law, Torts, 2d, §§ 343, 343A.

STATEMENT OF FACTS

Petitioner's statement of the facts is partially correct, with some of the most critical points being de-emphasized in his version of the case. [pet. pp. 4-6].

Plaintiff was injured on a ladder which was expressly left in the hold of the vessel by petitioner's crew for use by the longshoremen to work containers. The deposition of the first officer, Fritz Storbeck, was taken and read to the jury during the plaintiff's case in chief [Tr. pp. 367-374]. In that portion of the record, Officer Storbeck stated that he was in charge of super cargo, and that each hold of the vessel was furnished with a long metal ladder for use by the crew and the longshoremen during their operations. The type of ladder he described was the type which was testified to as being the instrumentality of harm to the plaintiff, and the type of ladder in the photographs shown to the jury [Exhibits 1-10]. The testimony was unequivocal that the plaintiff's gang had used the stevedoring company's ladder all day, except for the one time when the vessel's ladder had been used

in a hurry to get Matthews down from the second to last container to be unloaded from the hold.

Plaintiff introduced exhibit 61 at trial which were the stevedore's records of the time the vessel arrived at Chicago, the time work began, and which men worked in the respective holds. It showed that the vessel had arrived in port on December 4, 1976 at about 7:00 a.m., that work began at about 8:00 a.m., and that the time and date of the injury was the first day of work on the M/V Tilly Russ, i.e., December 4, 1976 at about 2:30 p.m.

Respondent argued in the Seventh Circuit that the stevedoring company fulfilled its obligation to provide "at least one safe and accessible ladder for each gang working in a hatch." [p. 46 Respondent's Brief in the court below] in accordance with Title 29 C.F.R. § 1918.25. The jury believed that the ladder upon which plaintiff was injured belonged to the vessel, even though counsel for petitioner informed the court, in the presence of the jury, at trial "We can say we honestly don't know who owns the ladder". The court retorted, ". . . In view of that ask him [the plaintiff] some questions about this ladder then let the jury decide who owned the ladder. That will be a question of fact for the jury to find out." [Tr. p. 33].

Petitioner makes great the contention that "Mid-States [stevedoring] supervisors knew of the defective ladder [pet., p. 4]. This, petitioner does not qualify, is based on a hearsay statement heard by the jury largely by defense counsel's coaxing the witness to testify "the ladder was bad" [Testimony of James Green, Tr. pp. 404-5]. Nonetheless, this supposed knowledge was nowhere in the record imputed to the plaintiff.

The ladder was the property of the ship and the jury was charged and could reasonably have found that the condition of the ladder existed for such a long period of time that knowledge of its condition could be imputed to the crew. [Tr. p. 665].

There was evidence that it was customary to use the vessel's equipment left on the ship during longshoring operations. [Ware's testimony, Tr. pp. 176-7].

Petitioner now contends that the panel of the Seventh Circuit erroneously affirmed the jury's verdict and district court's judgment because, *inter alia*, the jury was charged with the Jones Act and FELA efficient cause instruction, rather than the proximate cause instruction. It is contended that, under the facts and circumstances of this case, the cause of plaintiff's fall from the ladder was something the jury correctly resolved, as the Court of Appeals found, if there was any error, it was harmless.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED

I.

THERE IS NO TRUE CONFLICT WITH THE EDMONDS DECISION OF THE SUPREME COURT.

Petitioner's allegations that the panel of the Seventh Circuit which affirmed the jury's award for the plaintiff constituted approval of a standard of causation which is contrary to that established in *Edmonds v. Compagnie Generale Transatlantique*, ... U.S. ....., 47 L.W. 4868 [decided June 27, 1979, No. 78-479] is misleading in that the decisive utterance in *Edmonds* chiefly denounced the "equitable credit" doctrine urged by the insurance industry that the vessel owners should only pay its proportionate share of the fault causing the plaintiff's damages in a case where the longshoreman, the stevedoring company and the vessel were each concurrently negligent. The standard of causation was not an issue in that case, nor was it expressly or impliedly passed upon in the court's reasoning, save the reference that [in footnote 15, *Edmonds*] "in many cases, of course, the shipowner whose act or omission contributed only a very small percentage of the total negligence will avoid liability on the ground of causation." This could have been argued to the jury by respondent in the court below, but it is now too late for the vessel owner to make this argument and attempt to twist a question of fact into one of law.

II.

PETITIONER SEEKS TO CREATE AN IMAGINED CONFLICT OR POLEMIC WITH RESPECT TO WHAT CONSTITUTES NEGLIGENCE SINCE THE 1972 AMENDMENTS TO THE LHWCA.

The Supreme Court of the United States intimated in *Edmonds* that nothing in the 1972 Amendments reflected a Congressional intent to modify the previously existing body of admiralty negligence law. Petitioner would have us believe in its brief that the longshoreman's burden in a negligence claim is heavier than it ever was, and that the Seventh Circuit panel was placing heavier burdens on shipowners [Pet., p. 8]. This is simply not the case. As *Edmonds* reiterated, admiralty law is judge-made law to a great extent. *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963). Here, the courts below applied the simple admiralty negligence principle found in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, of "reasonable care under the circumstances" toward every person aboard a vessel whose purposes were not inimical to the vessel.

It is true that "negligence" is not defined in the LHWCA, but any problem with respect to its definition would be largely petitioner's own creation.

Petitioner would have us believe that relinquishment of control of the vessel to the stevedoring company should exonerate the owners from liability. This simplistic view completely overlooks the Congressional mandate that the responsibility for safety of the longshoremen should be placed on the person in the best position to avoid creating a dangerous working condition. In this regard, the words of the Senate Committee

are very clear, and can be found in the Seventh Circuit's opinion [Pet., A-11 and A-12].

The facts believed by the jury were that the crew of the vessel had allowed a negligently maintained ladder to remain in the lower hold of the ship for such a long period of time that notice of its condition was imputed to it.

III.

THE DECISION BELOW WAS IN ACCORDANCE WITH WELL-RECOGNIZED PRINCIPLES OF ADMIRALTY TORT LAW, REGARDLESS OF PRE-1972 OR POST-1972 APPLICATION.

Petitioner would have us believe, too, that the decision of the district court and the panel of the Seventh Circuit are both erroneous because they are inconsistent with principles applied by the vast majority of other courts of appeals, and that a judgment n.o.v. or a directed verdict should have been entered in favor of the shipowner.

As the facts developed, plaintiff in the court below was injured as a result of a 12 foot ladder having a missing safety shoe, when the weight of his body caused the ladder to run out from under him as he was descending from a container. Before and during the jury trial, petitioner urged that "land-based" principles applied. Plaintiff then tendered a jury instruction in accordance with § 388 of the Restatement of the Law, Torts, 2d [pet. p. A-11], which was charged to the jury, and which had been given in *Gallardo v. Westfal-Larsen & Co.*, 435 F. Supp. 484, 490. That instruction was a "land-based" type of instruction which analogized the vessel owner to the occupier of land as a supplier of chattels. That is perfectly consistent with the mandate of Congress that

the "vessel will still be required to exercise the same case as a land-based person in providing a safe place to work." [Pet. p. A-12]. It was also consistent with pre-1972 admiralty law.

All the more reason why the petition for certiorari should be denied is that, even under § 343A there is a well-recognized exception to the "open and obvious" rule. Generally, the vessel is not liable for injuries caused to the longshoremen by open and obvious conditions; but, where the longshoremen are in no position to avoid the danger, despite its obviousness, the vessel will still be liable for injuries. This exception has found much support in the circuits. *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861, *Lubrano v. Royal Netherlands Steamship Co.*, 572 F.2d 364, 366 (2d Cir., 1978); *Napoli v. Hellenic Lines Ltd.*, 536 F.2d 505, 508-9 (2d Cir., 1976); *Gay v. Ocean Transport & Trading Ltd.*, 546 F.2d 1233, 1242 (5th Cir., 1977); *Lopez v. A/S D/S Svendborg, et al.*, 581 F.2d 319 (2d Cir., 1978).

It is common knowledge that longshoremen since time immemorial have been required to work in tight quarters and to move with swiftness and great agility to clear for safety from rising pallets, collapsing cargo and, in modern times, huge containers weighing often 10-20 tons which are sailing about overhead. Under these conditions, a longshoreman or his co-workers often does not have the time to make a thorough inspection of the equipment left by the vessel's crew for his use, where both they and the equipment have a lawful right to be. The jury weighed all the evidence, and found the defendant petitioner had been negligent. That fact should not be re-examined in the Supreme Court.

RELATED CASES

Clemons v. Mitsui O.S.K. Lines, Ltd., No. 79-706 [maritime custom].
Bachtel v. Mammouth Bulk Carriers, No. 79-538.
Santos v. Scindia Steam Navigation Co., No. 79-512.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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